IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7443 of 1995

For Approval and Signature:

Hon'ble MS.JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

BIJAL BHIMJIBHAI GOHEL SINCE DECEASED THROUGH HEIRS & L.R.

Versus

STATE OF GUJARAT

Appearance:

MR YN OZA for Petitioners

Mr. V.B.Gharania,Asstt.GP for Respondent No. 1

CORAM : MS.JUSTICE R.M.DOSHIT

Date of decision: 13/08/97

ORAL JUDGEMENT

The petitioner-delinquent, while serving as a Deputy Commissioner of Sales Tax, was served with the Chargesheet dated 26th July, 1991 in respect of certain decisions rendered by the delinquent on revision application preferred by one M/s. Avani Petrochem Private Ltd., Baska, Taluka Halol, District Panchmahals. The delinquent was alleged to have exercised the revisional jurisdiction which he was not authorized to do. It was alleged that earlier also, in case of one M/s. Simalin Chemical Industries Private Ltd. the petitioner had exercised such revisional jurisdiction and the Commissioner of Sales Tax under Memorandum dated 18th January, 1989 had issued warning to the delinquent not to exercise such revisional jurisdiction. The matter arose of the assessment of said M/s. Avani Petrochem Pvt. Ltd.. The order was taken into suo motu revision by the Assistant Commissioner of Sales Tax and the said Assistant Commissioner of Sales Tax had levied the penalty and interest to the tune of Rs.96,280/-. Against the order in revision, the assessee could have preferred an application before the Gujarat Sales Tax Tribunal. However, the assessee instead of preferring appeal/revision application before the Tribunal, as aforesaid, made an application in Form No. 46 to the delinquent herein. It is the case of the Department that a revision application under section 67 of the Gujarat Sales Tax Act could have been preferred by filing an application in Form NO. 47. Further, once an order of assessment was taken in revision by the Assistant Commissioner of Sales Tax, further revision against the order made in revision would not be maintainable. Inspite of this legal position, the delinquent treated the application made by the assessee as one under section 67 of the Act [though it was not made in Form No. 47 as required] and in exercise of his revisional power, removed order of penalty and interest levied upon the assessee. Thus, he caused loss of Rs.96,280/- to the revenue It was alleged that the action of the delinquent was not bona fide. It was further alleged that the said assessee had claimed benefits of sales tax incentive scheme as a manufacturer having its manufactory in the backward area. However, said assessee was found to be reseller and was not entitled to the benefits of the sales tax incentives admissible to a manufacturer. Hence, the delinquent was duty bound to take steps against said assessee to recover the benefits received by it. However, he did not do so. A corrigendum/addendum to the said chargesheet was issued on 10th May, 1994. The word "penalty" was substituted by the words "penalty and interest" and the figure "Rs.96280/-" was substituted by "Rs.96,848/-".

2. In view of the above referred chargesheet, the disciplinary proceeding was held against the delinquent and inquiry officer submitted his report on 4th May, 1995. Copy of the Inquiry officer's report was forwarded to the delinquent on 24th May, 1995 and he was called upon to submit his representation within fifteen days from the receipt of the copy of the said inquiry officer's report. The petitioner, however, submitted his representation on 5th August, 1995. Under the impugned order dated 28th August, 1995, the delinquent was ordered to be dismissed from service. While issuing the above referred order of dismissal, representation submitted by the petitioner on 5th August, 1995 was not taken into consideration. Feeling aggrieved, the delinquent had preferred this petition. Pending this petition, the delinquent has expired and the petition is prosecuted by his heirs and legal representatives.

3. Learned advocate Mr. Oza has appeared for the petitioner-delinquent and has challenged the validity of the order of dismissal from service on the following grounds :

(a) the impugned order is vitiated on account of nonobservance of the principles of natural justice;

(i) after the fresh charge was levelled on 10th May, 1994, the delinquent was not offered further opportunity to defend himself against the said charge.

(ii) the representation submitted by the delinquent on 5th August, 1995 has not been taken into consideration.

(b) The assessment in question of M/s. Avani Petrochem Pvt. Ltd. from which the revision was preferred has been set aside finally by the Tribunal under its judgment and order dated 27th September, 1995 and, therefore also, neither the order made by the delinquent can be said to be erroneous, nor he can be said to have acted with malafide intention.

(c) The finding recorded by the Inquiry Officer against the delinquent is beyond the scope of the charge levelled against the delinquent.

(d) The penalty of dismissal from service imposed

upon the delinquent is exorbitant and is not commensurate with the guilt established against the delinquent more particularly when the delinquent was about to reach the age of superannuation within three days from the date of the order.

4. I have examined records of the disciplinary proceedings as well as Rojkam maintained by the Inquiry Officer. Upon such examination, I find that after the issuance of the corrigendum/addendum to the chargesheet on 10th May, 1994, the delinquent and his next friend had on 25th May, 1994, had made submission before the Inquiry Officer that no further inquiry was required to be conducted in respect of the corrigendum/addendum dated 10th May, 1994. They had submitted that if the Presenting Officer is called upon to submit his brief statement on the additional charge and the delinquent were given an opportunity to submit his supplementary reply, that should serve the ends of justice. Accordingly, the Presenting Officer was directed to submit the additional statement by 10th June, 1994 and the delinquent was given an opportunity to submit his supplementary reply on 27th June, 1994. The delinquent on 27th June, l994 presented his supplementary reply before the Inquiry Officer. Thus, in my view, the delinquent was offered sufficient opportunity to defend himself as requested by him. Further, in his representation submitted on 5th August, 1995 also, the delinquent has not raised any objection as regards inadequate opportunity in this respect. In my view, therefore, the contention raised by Mr. Oza is not tenable.

5. Under communication dated 2nd May, l995, the delinquent was sent a copy of the Inquiry Officer's report and was called upon to submit his representation within fifteen days thereof. The delinquent however did not submit his representation till 5th August, 1995. Before the delinquent's representation was submitted on 5th August, 1995, a decision had alrleady been taken by the competent authority and under communication dated 29th July, 1995, papers were sent to Gujarat Public Service Commission for its recommendation. The recommendation made by Gujarat Public Service Commission was received on 24th August, 1995 In my view, the delinquent cannot be said to have been denied an opportunity to defend himself. The delinquent was given adequate opportunity to make his representation against

the findings recorded by the Inquiry Officer. The delinquent, however, did not avail of the said opportunity and before he submitted his representation, a decision was alrleady taken and forwarded to the Public Service Commission for its opinion and recommendation. The disciplinary authority had, thus, waited to receive the reply of the delinquent for nearly one month and thereafter the delinquent having failed to submit his reply, had taken decision to impose punishment upon the delinquent. The disciplinary authority could not have taken the delinquent's representation into consideration after the decision was taken and the papers were sent to Gujarat Public Service Commission for its opinion and recommendation. The impugned order made without considering the representation submitted by the delinquent therefore, cannot be vitiated for nonobservance of the principles of natural justice.

6. Mr. Oza has next contended that the assessment which was the root cause of the whole incident itself has been quashed and set aside by the Tribunal and, therefore also, the delinquent could not have been punished for the exercise of power and for cancelling the order of penalty. The judgment and order of the tribunal passed in the second appeals No. 263 and 269 of 1994 is placed on the records of the matter. It appears that after the delinquent in exercise of his revisional jurisdiction set aside the order of penalty and interest imposed by the Assistant Commissioner, Sales Tax, the matter was remanded to the lower authorities for completing assessment in accordance with the orders. While completing the assessment, interest was imposed under section 47(4A) of the Gujarat Sales Tax Act and the penalty was imposed under rule 28 of the Rules. It was this addition which was the subject matter of challenge before the tribunal and which has been set aside keeping in view the judgments of the Supreme Court. I do not think that the said judgment and order should have any effect on the revisional jurisdiction exercised by the delinquent which was the subject matter of an inquiry. Besides, even if the Tribunal had set aside the order of assessment as is being canvassed by Mr. Oza, that would not save the delinquent having exercised the revisional jurisdiction not vested in him.

7. Mr. Oza has next relied upon the findings recorded by the Inquiry Officer. He has submitted that while recording the finding against the delinquent , the Inquiry Officer has relied upon the Government Resolution

issued on 8th August, 1979. Copy of the said Resolution was neither supplied to the delinquent nor was it part of the records. Further, the Inquiry Officer has recorded the finding that the action taken by the delinquent was contrary to the instructions contained in the said resolution dated 8th August, 1979. Thus, the findings recorded by the Inquiry Officer is beyond the scope of charge levelled against the delinquent. I am afraid, I cannot accept this contention either. It may be noted that the delinquent at no point of time had made a demand for supply of the said resolution. Further, such contention has not been raised in his representation which was submitted on 5th August, 1995. I have perused the records of the Inquiry Proceedings. Said resolution dated 8th August, 1979 has been placed on records of the disciplinary proceedings. The instructions contained in the said resolution has been issued in respect of the decision of this Court in the matter of one M/s. Malavia Bros. and Co. rendered on Special Civil Application No. 1659 of 1972. Pursuant to the said decision of this Court, an instruction has been issued to all concerned to the effect that once an order has been taken into revision by one authority, the order made on revision cannot be taken into further revision by the other authority. Otherwise also, it is well settled proposition that the order of assessment made under the revisional jurisdiction of an authority cannot be made the subject matter of further revision. Besides, the delinquent also in his explanation submitted on 31st August, 1991 has alluded the said resolution. The contention, therefore, requires to be rejected.

8. Mr. Oza has next contended that the delinquent while exercising the revisional jurisdiction had acted bona fide and while doing so, he had relied upon the judgments of the Supreme Court as well as of this Court. It is true that the delinquent had raised a plea that his action was bona fide and in consonance with certain judgments of the Supreme Court as well as of this Court. He has also taken a plea that the warning issued to him on lst August, 1989 was wrong and no such warning ought to have been issued against the delinquent. Be that as it may, if after appreciating the evidence on record, the Inquiry Officer has recorded a finding that the action of the delinquent was against the settled proposition of law, and contrary to the instructions issued to him and the disciplinary authority has accepted such a finding, this Court, while exercising its power of judicial review, would not sit in appeal and reappreciate the evidence and record an independent finding. Suffice it

that the action of the delinquent has been found to be contrary to the settled proposition of law and is actuated by mala fide. By now, it is settled law that even an order made in exercise of quasi judicial power can be the subject matter of an inquiry by the disciplinary authority.

9. Mr. Oza has relied upon the proviso added to sec. 67 (2) of the Gujarat Sales Tax Act and has submitted that under the said Proviso also, a second revision against the order made in revision would be maintainable. I have perused the said Proviso and am convinced that under the said Proviso also, the delinquent was not empowered to exercise the revisional jurisdiction against the order made in revision.

10. At last, Mr. Oza has contended that considering the long service rendered by the delinquent, his service ought not to have been terminated just three days before he reached the age of superannuation. The adequacy of the punishment is a subject-matter tobe considered by the disciplinary authority. However, in the present case, it appears that the delinquent used to exercise the revisional jurisdiction not vested in to him frequently. The delinquent had to be issued warning on 18th August, 1989 for exercising such revisional jurisdiction in case of one M/s. Simalin Chemical Industries Private Ltd. Thus, it appears to me that inspite of the settled law and the warning issued by the superior officer, the delinquent used to exercise the revisional jurisdiction not vested into him. Considering these facts, the order of dismissal from service made against the delinquent does not call for any interference. Petition is, therefore, dismissed. Rule is discharged. There shall be no order as to costs.

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Vyas